SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 704

UNITED STATES OF AMERICA, ex Rel. ENG FON SING,

Petitioner,

against

BYRON H. UHL, District Director of Immigration and Naturalization at the Port of New York, or any other person having the body of said Eng Fon Sing in custody.

BRIEF IN SUPPORT OF THE APPLICATION OF PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, on this application for a writ of certiorari, urges that the United States Circuit Court of Appeals for the Second Circuit erred in affirming an order of the District Court dismissing a writ of habeas corpus and remanding the petitioner to the District Director of Immi-

gration and Naturalization for deportation in the following respects, namely:

(a) The learned lower courts disregarded the clear and unequivocal evidence showing that petitioner was denied a fair hearing before the immigration authorities.

(b) The learned lower courts disregarded the overwhelming proof presented to it that the issue of petitioner's age was arbitrarily injected into the proceedings by the immigration authorities for the purpose of raising a simulated factual issue on which it based its improper order of exclusion, notwithstanding petitioner sustained the burden of proof resting on him by law.

(c) The learned lower courts disregarded the overwhelming, uncontroverted evidence proving petitioner's relationship.

These errors were, no doubt, committed in the mistaken belief that the courts were bound by the decisions of this Court limiting the scope of judicial review, even though the conduct complained of was manifestly unfair.

Completely ignoring the evidence indicating a manifest abuse and flagrant violation of petitioner's rights, the learned Circuit Court cited the case of *Ng Kee Wong* v. *Corsi*, 65 F. (2d) 564 (C. C. A. 2, 1933) as authority for its affirmation. In doing so it is respectfully submitted that the learned court failed to give any recognition to the test laid down by that court in that case, namely, the issue is not how the court "would have decided the question of paternity on the evidence presented, but whether the evidence *against paternity was so slight* as to make the board's decision wholly arbitrary, amounting to a denial of a fair hearing." (Italics ours.)

There is not the slightest scintilla of evidence *against paternity* in this record. On the contrary, the overwhelm-

ing, uncontradicted evidence establishes paternity. The immigration officials extended themselves to overcome this seemingly unanswerable fact and were ultimately constrained to advance two untenable speculations, neither of which denied paternity and both of which admitted it, namely: that the father made a mistake in giving the wrong marriage date or petitioner was conceived before marriage (fol. 205). Quite obviously both these guesses admitted paternity.

It is because of these facts that the immigration authorities were impelled to resort to the feigned "age" issue resulting in the finding that the petitioner is older than he claimed to be.

Petitioner fully recognizes the courts have "no power to interfere unless there was either denial of a fair hearing, or the finding was not supported by the evidence, or there was an application of an erroneous rule of law." (*Kumaki Kaga* v. *Berkshire*, 75 F. (2d) 820; *Tisi* v. *Tod*, 264 U. S. 131.)

He is not asking this Court to weigh the evidence which was presented before the immigration officials. But he does ask this Court to examine the conduct of the administrative officials in the light of this particular record, to see whether or not the decision of exclusion was not the result of unfairness and has not been due to an abuse of the power vested by statute in said officials.

Cases of unfairness have arisen not dissimilar to the acts of unfairness here complained of which have prompted this Court to say that there has been a flagrant violation of the rights of a son of a citizen of the United States seeking admission.

See:

Tisi v. *Tod*, 264 U. S. 131;

Gegiow v. *Uhl*, 239 U. S. 3;

Zakonaite v. *Wolf*, 226 U. S. 272, 274;

Tang Tun v. *Edsell*, 223 U. S. 673, 681, 682;
Chin Yow v. *U. S.*, 208 U. S. 8;
U. S. v. *Ju Toy*, 198 U. S. 253;
Kwock Jan Fat v. *White*, 253 U. S. 454;
U. S. ex rel. Bilokumsky v. *Tod*, 263 U. S. 149;
Ng Fung Ho v. *White*, 259 U. S. 276, 284.

If our courts are to shut their eyes to a palpable miscarriage of justice because they feel precluded by judicial precedent from interfering with an administrative body even though the factual issue before that body be a feigned one, intentionally created by it so as to give it immunity from such interference, then it is respectfully submitted there may never be a case where it will be possible to say that an unfair hearing was accorded one seeking admission into this country as the foreign born son of a citizen of the United States.

As was said by Mr. Justice Clarke of this Court, in *Kwock Jan Fat* v. *White*, 253 U. S. 454, at page 457:

> "It is fully settled that the decision of the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute (citing) or that '*their authority was not fairly exercised*, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law'. Tang Tun *v.* Edsell, Chinese Inspector, 223 U. S. 673, 681, 682. *The decision must be after a hearing* in good faith, however summary, Chin Yow *v.* U. S., 208 U. S. 8, 12, *and it must find adequate support in the evidence*, Zaconaite *v.* Wolf, 226 U. S. 272, 274."

So that the manifest error of the lower courts be corrected and a glaring instance of abuse on the part of the

immigration officials be undone, resulting in the denial to the petitioner of a most cherished right, it is respectfully prayed that the petition for writ of certiorari be granted.

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October 16, 1941.